Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1995

ARTURO YANEZ-PENALOZA,

Petitioner

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

1. Whether an applicant for relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), is barred, as a question of law, from administrative reconsideration, in light of recent changes in the Immigration and Nationality Act, an issue on which the courts of appeal are in direct conflict.

2. Whether a non-statutory federal board's interpretation of the deportation statute it administers requires judicial deference under this Court's holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where this Court itself has not granted such judicial deference in the interpretation of statutory language in deportation proceedings, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992)

3. Whether a court of appeals under this Court's holding in *Chevron U.S.A. v. National Defense Council, Inc.*, 467 U.S. 837 (1984), should defer to a decision of the Board of Immigration Appeals, an inferior nonstatutory administrative unit of the Department of Justice, in the interpretation of deportation laws, where the Attorney General, as the agent statutorily charged with interpretation and administration of the deportation laws, has issued a prior published administrative precedent to the contrary.

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Reasons for Granting the Writ:

I. The decision of the Fifth Circuit Court of Appeals, affirming the decision of the Board of Immigration Appeals, conflicts with the decisions of other circuits regarding the interpretation of 8 U.S.C. 1101 (a)(20) and 1182(c), yielding opposite results depending solely on the circuit in which a final order of deportation is reviewed. 3

II. Unqualified deference to the BIA's decision is not warranted, since this Court's holdings in *Cardoza-Fonseca* and *Elias-Zacarias* do not require absolute deference to a non-statutory departmental board on a question of statutory construction. 5

III. A construction given to the Immigration and Nationality Act by the Attorney General supersedes an inconsistent construction of that statute by the Board of Immigration Appeals, and warrants deference, both as a matter of statutory construction and in accordance with this Court's holding in *Chevron.* 7

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OPINIONS BELOW

Included in the appendix hereto are all orders and opinions rendered on the merits of this petition:

1. Per curiam decision of the Court of Appeals for the Fifth Circuit, dated December 13, 1995, denying Petition for Review and affirming the Board of Immigration Appeals' decisions of October 4, 1994 and March 3, 1995.

2. Decision of the Board of Immigration Appeals, dated March 3, 1995, denying Petitioner's motion to reopen and reconsider.

3. Decision of Board of Immigration Appeals, dated October 4, 1994, denying Petitioner's appeal from the order of deportation entered against him.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 13, 1995. Petitioner subsequently filed a motion for stay of mandate at the Fifth Circuit, and a stay of mandate was granted until March 1, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(20) provides:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C 1182(c), provides in pertinent part.

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) [defining classes of excludable aliens] ....

This section is interpreted to apply in deportation proceedings. The applicability of this section is not in issue. At issue is the term "lawfully admitted for permanent residence, such status not having changed" as defined by 8 U.S.C. 1101(a)(20), and as used in 8 U.S.C. 1182(c).

STATEMENT OF THE CASE

Petitioner Arturo Yanez-Penaloza, a native and citizen of Mexico, was admitted to the United States as a permanent resident on August 10, 1978, based on an immediate relative visa petition filed on his behalf by his wife, a U.S. citizen. Petitioner has lived continuously in the United States since 1978, and has four children, all U.S. citizens. On July 30, 1992, he was convicted in U.S. district court of entering the United States without inspection, in violation of 8 U.S.C. 1325.

Petitioner was then placed in deportation proceedings. On March 9, 1994, Immigration Judge McPhaul found him deportable for entering the United States without inspection, and denied his application for suspension of deportation and voluntary departure.

A timely appeal was filed with the Board of Immigration Appeals. On October 4, 1994, the Board found that Petitioner was deportable. It also held that Petitioner's continuous residence in the United States had been interrupted by his entry without inspection in 1992, and that he did not satisfy the requirements for suspension of deportation.

Petitioner then moved the Board to reopen and reconsider, based on a recent amendment to section 245 of the Act. He claimed that he was eligible for adjustment of status under a recent amendment to the Immigration and Nationality Act, INA 245(i); and that this adjustment might be combined with relief under INA 212(c).

The Board denied the motion on March 3, 1995. It restated its determination that when Petitioner was found deportable by the Board, his lawful presence in the United States ended, and he was therefore ineligible for waiver relief under INA 212(c); although it conceded that he might be eligible for the requested release, if he had not lost permanent resident status.

Petitioner then filed a Petition for Review with the Court of Appeals for the Fifth Circuit, which affirmed the Board's denial of his motion to reopen and reconsider.

JURISDICTION OF THE COURT OF FIRST INSTANCE

Jurisdiction of the Court of Appeals below was based on 8 U.S.C. 1105a(a) and this Court's holding in *Giova v. Rosenberg*, 397 U.S. 18 (1964) (court of appeals can review an order of the Board denying a motion to reopen an order of deportation, as a final order of deportation).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE OTHER CIRCUITS REGARDING THE INTERPRETATION OF 8 U.S.C. 1101(a)(20) AND 1182(c), YIELDING OPPOSITE RESULTS DEPENDING SOLELY ON THE CIRCUITS IN WHICH A FINAL ORDER OF DEPORTATION IS REVIEWED.

Discretionary relief under Section 212(c) of the Act is available

only to lawful permanent residents as defined by Section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20). This status is accorded to any alien who has attained lawful permanent resident status, "such status not having changed." If the alien's status has not changed, he or she can apply to the Board for further consideration based on facts arising since the record was closed, or on changes in the law. The Board may then reopen the proceeding in its discretion. If the status has changed, the alien is no longer eligible for the remedy even though the eligibility had been established by an application submitted at trial. The Board maintains that the change of status takes place when its own order becomes administratively final. *Matter of Cerna*, Int. Dec. 3161, 1991 WL 353528 (BIA, Oct. 7, 1991).

The courts of appeal are divided as to what event causes the loss of lawful permanent residence in the context of interpreting Sections 101(a)(20) and 212(c) of the INA . Some courts uphold the Board's "administratively final order of deportation" test. See, e.g., *Nwolise v. INS, 4 F.3d 306* (4th Cir. 1993*), cert. denied,* 114 S. Ct. 888 (1994)*; Rivera v. INS,* 810 F.2d 540 (5th Cir., 1987); *Variamparambil v. INS*, 831 F.2d 1352 (7th Cir., 1987). However, the contrary view has prevailed in the Eleventh, Ninth and Second Circuits. *Acosta Moreno v. INS*, 62 F.3d 1347 (11th Cir. 1995); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993)(en banc); *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991).

In *Butros*, the Ninth Circuit overruled its prior holding in *Gonzalez v. INS*, 921 F.2d 236 (9th Cir. 1990) and "switched sides". *Butros* held that the provisions of 8 CFR 3.2 provide reopening to consider facts arising after the hearing, and therefore the Board's decision (that a deportable alien lost permanent resident status when the deportation order became administratively final) impermissibly contravened the regulation. By holding that a final order of deportation bars the filing of a motion to reopen or reconsider, the Board arbitrarily prevents a large group of aliens from making the very motions contemplated by 8 C.F.R. 3.2.

Moreover, this Court has held that a motion to reopen renders an agency decision "non-final". *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). Consequently, the filing of a motion

to reopen or reconsider means that the administrative process is incomplete, and that there is no "final" order for the Court to review.

Section 212(c) relief is available in the discretion of the Immigration Judge only to long-time permanent residents who demonstrate unusual equities. Aliens residing in a state within the Second, Ninth or Eleventh Circuits can demonstrate these equities in any proceeding prior to physical deportation. But an alien who happens to reside in a state of the Third or Fifth Circuits is barred from introducing such evidence once the Board has entered a final order, even if this order is appealed to the federal courts. In the interim period, much may have changed in the alien's life, or in the Immigration and Nationality Act, but as a matter of law it cannot be considered in the Fifth Circuit. The alien and his family must suffer the harsh consequences of deportation.

Moreover, at issue in the present case is a motion to reconsider, which is qualitatively different from motions to reopen. A motion to reconsider is a motion that seeks reconsideration to take into account changes in the law, or misinterpretations of the law. The various circuit court decisions upholding the "administratively final order of deportation" test deal with motions to reopen, not to reconsider. These decisions reason that to permit motions to reopen to be filed after the issuance of a "final" order of deportation would only encourage aliens to manufacture new evidence. In the present case, however, there is no danger that Petitioner will manufacture additional evidence or use unfair means to gain more time in the United States. Rather, Petitioner seeks reopening solely to take advantage of an amendment to INA 245 (i), and the BIA's holding in *Matter of Gabryelsky*, Interim Decision 3213 (BIA, 1993), events over which he had no control. As such, he should not be barred from moving for reconsideration. The regulations do not specify any time limit for bringing a motion to reconsider, except that it may not be brought after the physical departure of the alien from the United States. *Chudsevid v. INS*, 641 F.2d 780, 784 (9th Cir., 1981).

II.

UNQUALIFIED DEFERENCE TO THE BIA'S DECISION IS NOT WARRANTED, SINCE THIS COURT'S HOLDINGS IN

CARDOZA-FONSECA AND *ELIAS-ZACARIAS* DO NOT REQUIRE ABSOLUTE DEFERENCE TO A NON-STATUTORY DEPARTMENTAL BOARD ON A QUESTION OF STATUTORY CONSTRUCTION.

An agency's interpretation of the statute it administers is subject to limited judicial review under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* held that courts should defer to agency interpretations of the statutes committed to them for enforcement. However, it also conceded that the judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear Congressional intent.

Chevron was decided in 1984. It was followed by *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In deciding *Cardoza-Fonseca*, Justice Stevens for the Court focussed on the authority of the Court as the final authority in issues of statutory construction involving clear congressional intent, and made only a passing mention of *Chevron*. *Cardoza-Fonseca* therefore modified the standards for judicial review of agency action.

In *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), this Court decided an important question of statutory interpretation relating to asylum in deportation proceedings; *Chevron* was neither mentioned nor even noted. In *Cardoza-Fonseca*, this Court emphasized the judiciary's power to conduct independent examination of statutes.

The treatment of *Chevron* in deportation cases such as *Cardozo-Fonseca* and *Elias-Zacarias* suggests that the application of *Chevron* is narrower than urged by the Immigration and Naturalization Service.

Several commentators have noted the many exceptions to *Chevron*. Herz, *Deference Running Riot: Separating Interpretive and Lawmaking under Chevron*, 6 Admin. L.J. 187 (1993); Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992). Professor Merrill, analyzing *Chevron*-implicated cases decided by the Court between 1984 and 1990, found that only one-third of these decisions actually applied

Chevron. Id, at 981. He interprets *Cardoza-Fonseca* as avoiding *Chevron* where the issue is purely one of law.

The Court is invited to compare its decision in *INS v. Phynpathia*, 464 U.S. 183 (1984), decided in the same term as *Chevron*. In *Phynpathia,* this Court did not defer to the same Board of Immigration Appeals. In fact, it overrode a long period of administrative interpretation as contrary to specific statutory language.

In *Matter of S.*, 6 I&N Dec. 392 (BIA 1954)(affirmed Attorney General, March 15, 1955), the Board and the Attorney General's intepretation of INA 101(a)(20) gave effect to Congressional intent to preserve permanent resident status throughout deportation proceedings. That intent was clearly expressed at the time the United States immigration and nationality laws received intense and comprehensive congressional attention during the recodification resulting in the 1951 Act. This Court has also held the INA to mean that the change of status which Congress had in mind was a change from an immigrant lawfully admitted to permanent residence to the status of nonimmigrant pursuant to 8 U.S.C. 1257. *Saxbe v. Bustos*, 419 U.S. 65, 72 (1974).

Cerna, supra, which enunciated the "administratively final order of deportation" test, not only failed to consider that legislative process but held contrary to it. It therefore contravenes this Court's holding in *Cardoza-Fonseca*, which preserves the integrity of legislation as against agency interpretation, where, as here, there is a conflict. *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992).

It is submitted that this Court's review is needed to end the apparent confusion as to the proper application of *Chevron* in the context of the issues decided in *Cardoza-Fonseca*, *Elias- Zacarias* and *Phynpathia*.

III.

A CONSTRUCTION GIVEN TO THE IMMIGRATION AND NATIONALITY ACT BY THE ATTORNEY GENERAL SUPERSEDES AN INCONSISTENT CONSTRUCTION OF THAT STATUTE BY THE BOARD OF IMMIGRATION

APPEALS, AND WARRANTS DEFERENCE, BOTH AS A MATTER OF STATUTORY CONSTRUCTION AND IN ACCORDANCE WITH THIS COURT'S HOLDING IN *CHEVRON*.

The brief of the Immigration and Naturalization Service to the Court of Appeals for the Fifth Circuit urged that the agency statutory interpretation established by *Chevron*, supra, be upheld. However, the application of *Chevron* is contrary to the administrative structure created by the Immigration and Nationality Act ("Act"). Unlike the administrative agency at issue in *Chevron*, the Board of Immigration Appeals was not established by the statute it administers and is not charged with enforcement of the Act. That responsibility is vested in 8 U.S.C. 1103(a) in the Attorney General. 8 C.F.R. 3.1. That delegation of jurisdiction by the Attorney General in no way reduces her statutory authority as the officer responsible for administration of the immigration laws.

The Attorney General's construction of INA 101(a)(20), and specifically the clause "such status not having changed", is that status as a lawful permanent resident is not lost until the alien voluntarily relinquishes that status or is physically deported. *Matter of S.*, supra. The Attorney General has never overruled or retracted this construction of INA 101(a)(20). The Board never sought the Attorney General's approval of its contrary position in *Cerna*, or in the instant case. See 8 C.F.R. 3.1(h) providing for referral to the Attorney General.

As a creation of the Attorney General, the Board has no authority to interpret the Act contrary to the Attorney General's interpretation. The Board has done so in this case. If *Chevron* requires a reviewing court to defer to the agency charged with enforcement, that agent to whom deference is due is the Attorney General. Instead, the Third and Fifth Circuits continue to defer to the Board. This is contrary to the purpose and holding of *Chevron*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit in this case.

Respectfully submitted,



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February 19, 1996

APPENDIX A—OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT , DATED DECEMBER 13, 1995, DENYING THE PETITION FOR REVIEW AND AFFIRMING THE BOARD OF IMMIGRATION APPEALS' DECISION OF MARCH 3, 1995.

Filed December 13, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No: 95-60156
Summary Calendar

ARTURO YANEZ-PENALOZA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
BIA No. A35-933-046

Before KING, SMITH, and BENAVIDES, Circuit Judges.
PER CURIAM:[1]

Mexican citizen Arturo Yanez-Penaloza appeals the Board of Immigration Appeals's (BIA) deportation order and its denial of his motion for reconsideration and to reopen his deportation proceedings seeking adjustment of status pursuant to 8 U.S.C. 1255(i) (Sec. 245(i) of the Act) and 8 U.S.C. 1182(c) (Sec. 212(c) of the Act). Yanez-Penaloza argues that the Board erred in basing its deportation decision on evidence presented during the relief stages of his proceedings. He also argues that the Board abused its discretion in denying his motion to reconsider or reopen by deciding that he was no longer eligible for Sec. 212(c) relief after the final order of deportation.

This court does not have jurisdiction to review the underlying deportation order because the petition for review was not filed within 90 days. See 8 U.S.C. 1105(a)(1); *Stone v. I.N.S.*, 115 S. Ct. 1527, 1542 (1995). Regarding the motion for reconsideration or to reopen, we have reviewed the record and the BIA's opinion and find no abuse of discretion. Accordingly, we dismiss the petition for review.

PETITION DISMISSED.

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

APPENDIX B — DECISION AND ORDER OF BOARD OF IMMIGRATION APPEALS, DENYING PETITIONER'S MOTION TO REOPEN AND RECONSIDER, DATED MARCH 3, 1995

United States Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A35 933 046 — San Antonio

In re: ARTURO YANEZ-PENALOZA

MOTION
ON BEHALF OF RESPONDENT: Gloria Lee Vera, Esq.
2216 College Avenue
Austin, Texas 78704

ON BEHALF OF SERVICE: Lawrence J. Hadfield
Assistant District Counsel

CHARGE:
Order: Sec. 241 (a)(1)(B), I&N Act [8 U.S.C. 1251(a)(1)(B)] — Entered without inspection

APPLICATION: Reconsideration; reopening

In a decision dated March 9, 1994, the immigration judge found the respondent deportable under section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1)(B), as an alien who entered the United States without inspection. The immigration judge denied the respondent's request for suspension of deportation under section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1), and denied his request for voluntary departure in lieu of deportation. The respondent was ordered deported to Mexico. He appealed from this decision. This appeal was

dismissed by the Board of Immigration Appeals on October 4, 1994.

The respondent argues that we should reconsider our dismissal of his appeal because it was based on evidence we should not have considred in our decision. Further, he moves the Board to reopen the proceeding as he now claims eligibility to seek relief from deportation through an adjustment of status combined with a waiver of deportability under section 212(c) of the Act, 8 U.S.C. 1182. We do not find that either of these motions have merit.

A motion to reconsider is used to allege errors in appraising the facts and the law. It must state the reasons upon which the motion is based and must be supported by such precedent decisions as are relevant. There is no requirement of new facts or new precedent. A motion to reopen, on the other hand, seeks fresh consideration in light of new facts or a change in circumstances since the decision. It must state the new facts to be proved at the reopened hearing and must be supported by affidavits or other evidentiary materials. See 8 C.F.R. 3.8(a); *cf.*, *Pierre v. INS*, 932 F.2d 418 (5th Cir. 1991); *Hyun Joon Chung v. INS*, 720 F.2d 1471 (9th Cir. 1983), *cert. denied* 467 U.S. 1216 (1984); *Sanchez v. INS*, 707 F.2d 1523 (D.C. Cir. 1983)(per curiam); *Chudsevid v. INS*, 641 F.2d 780 (9th Cir. 1981).

In his motion to reconsider, the respondent alleges tht we erred in our October 4, 1994 decision. In the case as it came before us, the immigration judge had found the respondent, at the time a lawful permanent resident, deportable because he entered the United States without inspection. We held that in the United States Court of Appeals for the Fifth Circuit, where the incidents took place, entry without inspection, in and of itself, did not necessarily constitute an entry and therefore in this case did not render the respondent deportable. We went on to find, however that the respondent entered the United States without inspection while aiding others without proper documentation and this resulted in an entry and was a deportable offense.

The respondent argues that the Board's finding that the respondent aided others in entering the United States was improperly based on evidence that was introduced during the relief portion of the

proceedings, after the Immigration and Naturalization Service had rested its case with respect to deportability. He then cites 8 C.F.R. 242.17(e) to support his argument that the use of this evidence was improper. This regulation states:

> An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability.

8 C.F.R. 242.17(e).

The regulation cited is not applicable to the current situation. The evidence the respondent objects to is the Record of Sworn Statement (Form I-263B) and the testimony of the border patrol agent who made the arrest. We did not consider the application the respondent completed to request relief from deportation. As noted, the use of this application is prohibited by 8 C.F.R. 242.17(e). The evidence we relied on, however, was an appropriate basis for our decision. The respondent has not pointed to any regulations, statutes or case precedent that require us to ignore evidence simply because it was introduced during a certain phase of the proceedings.

We also find that the respondent's motion to reopen fails to establish a prima facie case that he is eligible for the relief requested. In a motion to reopen, an alien must demonstrate new and material evidence that must be sufficient, if proved, to change the result of the previous decison, that is, a prima facie showing must be made, both that the alien is statutorily eligible for the relief sought, and that he warrants that relief in the exercise of discretion. *See INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Bagamasbad*, 429 U.S. 24 (1976); *Matter of Leon- Orosco and Rodriguez-Colas*, 19 I&N Dec. 136 (BIA 1983; A.G. 1984); *Matter of Martinez- Romero*, 18 I&N Dec. 75 (BIA 1981), *aff'd* 692 F.2d 595 (9th Cir. 1982); *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979).

The Supreme Court has held that at least three independent grounds

exist upon which this Board may deny a motion to reopen. *INS v. Doherty, supra*; *INS v. Abudu, supra*, at 104-105. First, this Board may deny a motion to reopen based upon the movant's failure to establish a prima facie case for the relief sought. *INS v. Wang*, 450 U.S. 139, 143, n.5 (1981)(per curiam); *Yousif v. INS*, 794 F.2d 236 (6th Cir. 1986); *Bahramnia v. United States INS*, 794 F.2d 1243 (5th Cir.), *cert. denied*, 479 U.S. 930 (1986); *Matter of Coelho*, Interim Decision 3172 (BIA 1992); *Matter of Ruiz*, Interim Decision 3116 (BIA 1989); *Matter of Egbunine*, 19 I&N Dec. 478 (BIA 1987); *Matter of Tuakoi*, 19 I&N Dec. 341 (BIA, 1985); *Matter of Reyes*, 18 I&N Dec. 249 (BIA 1982); *Matter of Martinez- Romero, supra*. Second, the Board must deny a motion to reopen in the absence of previously unavailable, material evidence. 8 C.F.R. 3.2 (1992). Finally, a motion to reopen may be denied in the excercise of discretion or, where the ultimate form of relief is discretionary, the Board may permit such a motion upon a finding that the underlying relief requested would be denied as a matter of discretion. *INS v. Doherty*, supra, at 725; *INS v. Bagamasbad*, supra; *Hibbert v. INS*, 554 F.2d 17, 21-22 (2d Cir. 1977); *Matter of Reyes, supra*.

In his motion to reopen, the respondent argues that he is eligible for an adjustment of status under section 245 of the Act and that this may be combined with relief under section 212(c). We agree with the respondent that in some cases, such a combination is possible and may be beneficial to an alien wishing to remain in the United States. See *Matter of Gabryelsky*, Interim Decision 3213 (BIA 1993). However, as we noted in *Matter of Gabryelsky, supra,* section 212(c) requires seven years of consecutive lawful unrelinquished domicile. In the Fifth Circuit, an alien loses this status when an order of deportation becomes administratively final. *Prichard-Ciriza v. INS*, 978 F.2d 219 (5th Cir. 1992); *Ghassan v. INS*, 1972 F.2d 631 (5th Cir. 1992); *Garcia-Hernandez v. INS*, 821 F.2d 222 (5th Cir. 1987); see *Matter* of *Cerna*, Interim Decision 3161 (BIA 1991), *aff'd* 987 F.2d 773 (11th Cir. 1992). Due to his order of deportation and our subsequent dismissal of his appeal, the respondent is no longer eligible for relief under section 212(c) and has therefore failed to demonstrate prima facie eligibility. His motion to reopen will be denied.

ORDER: The motion to reconsider and reopen are denied.

s/Mary Maguire Dunne
FOR THE BOARD

APPENDIX C — DECISION OF THE BOARD OF IMMIGRATION APPEALS, DATED OCTOBER 4, 1994, DENYING PETITIONER'S APPEAL FROM ORDER OF DEPORTATION

U.S. Department of Justice
Decision of the Immigration Judge
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A35 933 046 — San Antonio
Date: October 4, 1994

In re: ARTURO YANEZ-PENALOZA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gloria Lee Vera, Esquire
2216 College Avenue
Austin, Texas 78704

ON BEHALF OF SERVICE: Jane Thomson
General Attorney

CHARGE:
Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. 1251(a)(1)(B)] - Entered without inspection

APPLICATION: Suspension of deportation

In a decision dated March 9, 1994, the immigration judge found

the respondent deportable under section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1)(B), as an alien who entered the United States without inspection. The immigration judge denied the respondent's request for suspension of deportation under section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1), and denied his request for voluntary departure in lieu of deportation. The respondent was ordered deported to Mexico. He has appealed from this decision. The appeal will be dismissed.

The respondent is a native and citizen of Mexico whose status was adjusted to that of a lawful permanent resident on August 10, 1978. His spouse and four children are United States citizens. On July 30, 1992, the respondent was apprehended after being observed by a border patrol agent entering the United States without inspection in the company of two women. The women were without proper documentation. The respondent's signed Record of Sworn Statement (Form I-263B) indicates that he helped the two women enter the United States. The respondent's July 30, 1992, Order to Show Cause and Notice of Hearing (Form I-221) and his August 3, 1992, conviction of record for illegal entry make no reference to his aid to these women. During his hearing before the immigration judge, the respondent claimed his Fifth Amendment privilege against self incrimination and refused to testify regarding his possible smuggling of aliens. He did testify, however, that the Record of Sworn Statement was the product of coercion by the border patrol agent and on appeal he argues that it was taken in violation of his right to due process. He claims that the statement, therefore, should not have been admitted into evidence.

The immigration judge found the respondent deportable due to his entry without inspection. He also found the respondent ineligible for suspension of deportation under section 244(a)(1) of the Act, holding that the respondent had failed to demonstrate the requisite 7 years of continuous presence in the United States. In order to qualify for suspension of deportation, an alien must establish that he has been physically present in the United States for a continuous period of at least seven years, that he has been a person of good moral character during such period, and that his deportation would result in extreme hardship to himself or to his spouse, parent, or child who is a citizen of

the United States. Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1). An alien is not considered to have failed to maintain continuous physical presence in the United States under section244(a)(1) if his absence from the United States was brief, casual and innocent and did not meaningfully interrupt his continuous physical presence. Section 244(b)(2) of the Act; *Matter of Herrera*, 18 I&N Dec. 4 (BIA 1981); see *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Varga-Gonzalez v. INS*, 647 F.2d 457 (5th Cir. 1981). The respondent has the burden of establishing that he is eligible for suspension of deportation. See 8 C.F.R. 242.17(a) and (e).

The immigration judge ruled the respondent deportable and ineligible for suspension of deportation because he found that although a brief, casual departure did not constitute an entry and interrupt continuous presence, if the alien reenters without inspection this is a basis for deportation. He also found it causes a break in the seven-year period of continuous presence, thus rendering the respondent ineligible for suspension of deportation., The immigration judge went on to find that, even if the respondent's July 30, 1992, departure and absence did not break his continuous presence, he had failed to carry his burden of demonstrating such a presence. Further, the immigration judge concluded that the respondent lacked the good moral character necessary for section 244(a)(1) relief because he had previously committed a crime involving moral turpitude.

Unlike the immigration judge, we find that in the United States Court of Appeals for the Fifth Circuit, where this case arises, an entry without inspection does not automatically constitute an entry. It therefore does not, by itself, constitute a deportable offense, nor does it necessarily interrupt therespondent's continuous presence in this country thereby barring an application for suspension of deportation. *See Laredo-Miranda v. INS*, 555 F.2d 1242 (5th Cir. 1977). Our determination, in a case such as this, rests on whether or not the respondent aided others in evading our immigration laws. In the Fifth Circuit, entering without inspection while aiding others results in an "entry" and is thus a deportable offense and is interruptive of his presence, while entry without inspection alone is not. *Id.*

Having determined that in the Fifth Circuit the respondent will be deportable and will have interrupted his continuous presence in the United States if he aided others in entering illegally, we must determine whether the record demonstrates such assistance. The respondent claims that the only proof in the record that he aided others in illegally entering the country is inadmissible evidence. We do not find this to be the case. Not only is the respondent's Record of Sworn Statement, in which he claims he helped the women as a favor to his brother, admissible, but it is supported by the border patrol agent's statement regarding his observations of the respondent and the two women. We find that the record demonstrates the respondent's "entry" and deportability based on clear, unequivocal, and convincing evidence as required under section 241(a)(1)(A) of the Act. *See Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a).

The record contains a signed Record of Sworn Statement (Form I-263B) taken at the time of the respondent's arrest. In that statement the respondent admits helping two people enter the United States without inspection as a favor for his brother. The respondent claims that this statement was the product of coercion and a violation of Service regulations and therefore should have been excluded. At the outset we note that immigration proceedings are civil in nature and are not bound by the rules of evidence applicable in criminal proceedings. Rather, the test for the admissibility of evidence in a deportation proceeding is whether the evidence is probative and its use is fundamentally fair. See, e.g., *Bustos-Torres v. INS*, 898 F.2d 1053 (5th Cir. 1990); *Cunanan v. INS*, 856 F.2d 1373 (9th Cir. 1988); *Matter of Grilalva*, 19 I&N Dec. 713 (BIA 1988); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). The Supreme Court has held that the exclusionary rule does not apply in civil deportation hearings, where the issue is the exclusion of credible evidence gathered in connection with peaceful arrests by Service officers. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). As is the situation here, the Court in those cases noted that it was not dealing with egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.

Here the respondent is alleging that the agent's harsh manner was

coercion and that the agent's indication that the respondent did not need any counsel renders the statement inadmissible. We do not find from the record that the agent's actions demonstrate that use of the respondent's statement is fundamentally unfair or that it is lacking in probative value. It is therefore admissible. *Bustos-Torres v. INS, supra; Matter of Toro*, 17 I&N Dec. 340 (BIA 1980). First, although the respondent's and the border patrol agent's testimony differ, the immigration judge was in a better position to judge the credibility of the witnesses. The primary areas of disagreement concern the manner in which the agent conducted the interview and how the agent explained the respondent's right to counsel. The immigration judge's implicit determination of their credibility is given significant deference since he is best able to observe their demeanor. *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985); *Matter of Boromand*, 17 I&N Dec. 450 (BIA 1980). Second, even if the respondent's allegations are considered true, we do not find from the record that the agent's acts rise to a level of coercion that would render the method of obtaining the evidence fundamentally unfair. Simply speaking harshly with the respondent and encouraging him to sign the statement do not rise to this level. Regarding the respondent's claims that he did not receive any warnings about his right to counsel, the agent testified otherwise and there is respondent's signed statement in the record that he had received such advice. Finally, supporting the fairness of using the record, the officer who took the statement was present at the proceeding, affording the respondent the opportunity of cross examination.

The respondent also claims that the Service violated 8 C.F.R. § 287.3 when the arresting officer took his statement. This section of the Code of Federal Regulations provides that the arresting officer should not interview the alien, unless no other agents are available. The violation of Service regulations, alleged by the respondent, would have to have caused prejudice to the respondent to render his statement inadmissible. See *Molina V. Sewell*, 983 F.2d 676 (5th Cir. 1993); *Ku Fang Chan v. INS*, 634 F.2d 248 (5th Cir. 1981). While it appears from the record that this regulation may have been violated, it does not appear that the violation prejudiced the respondent. Nothing has been introduced or even suggested to

demonstrate that the respondent would have said something different had he been interviewed by a different agent. At the deportation hearing, the respondent simply claimed his Fifth Amendment right against self incrimination when asked about the statements in the Record of Sworn Statement. The respondent has failed in demonstrating that prejudice resulted from any violations of Service regulations.

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Here the respondent is alleging that the agent's harsh manner was coercion and that the agent's indication that the respondent did not need any counsel renders the statement inadmissible. We do not find from the record that the agent's actions demonstrate that use of the respondent's statement is fundamentally unfair or that it is lacking in probative value. It is therefore admissible. *Bustos-Torres v. INS*, *supra; Matter of Toro,* 17 I&N Dec. 340 (BIA 1980). First, although the respondent's and the border patrol agent's testimony differ, the

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credible, uncontested evidence on what he observed on the day of the respondent's apprehension. He observed the respondent cross the river with the two women. He saw them emerge together from the bushes on the United States side of the river and watched as the women apparently followed the respondent into town. Finally, after separating, all three arrived at the same truck stop at the edge of town. When questioned, the respondent took the agent to the room where the women were staying.

Based on the record, we find that the Service has demonstrated by clear, unequivocal and convincing evidence that the respondent is deportable as one who entered the United States without inspection while aiding others to do the same. *Woodby v. INS*, supra; 8 C.F.R. 242.14(a). Further, we find that because of such action, the respondent has failed to demonstrate his continuous presence in this country for seven years and is ineligible for suspension of deportation. Having found the respondent ineligible on this basis, we do not address the issue of whether the respondent had previouly committed a crime involving moral turpitude. The appeal will be dismissed.

ORDER: The appeal is dismissed.

s/Mary Maguire Dunne
FOR THE BOARD